Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00552-CR

Jose Carlos **LEAL**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 175th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR4767
Honorable Mary D. Román, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 27, 2016

AFFIRMED

Jose Leal was convicted by a jury of two counts of aggravated sexual assault of a child. On appeal, Leal contends the trial court erred in admitting evidence of an extraneous offense during the guilt-innocence phase of trial. Leal also contends the trial court erred by instructing the jury to resume its deliberations regarding Leal's guilt or innocence with regard to count II after the jury was retired to deliberate during the punishment phase of trial. We overrule Leal's issues and affirm the trial court's judgment.

BACKGROUND

Leal is the life partner of the biological uncle of the complainant, R.C. R.C. and his family lived with R.C.'s uncle and Leal for several years. In addition, after R.C. and his family moved into their own home, Leal and R.C.'s uncle continued to care for R.C. and one of his brothers on weekends and for extended periods of time during the summer.

When R.C. was ten years old in December of 2011, the Department of Family and Protective Services investigated an allegation of medical neglect regarding R.C.'s youngest brother. The Department's investigator interviewed R.C. regarding the allegations. During the interview, the investigator asked R.C. whether he had ever been inappropriately touched, and R.C. responded that Leal had inappropriately touched him.

During R.C.'s subsequent forensic examination and sexual assault exam, R.C. stated Leal made him "suck on [Leal's] middle part" and Leal also "sucks on [R.C.'s] middle part." R.C. reported the abuse occurred in the bathroom of Leal's home, the bathrooms at various restaurants, and the bathroom at a church. At trial, R.C. testified the abuse occurred five times in three years beginning when he was in second grade and ending approximately one month before he outcried to the Department's investigator.

EXTRANEOUS OFFENSE

In his first and second issues, Leal contends the trial court erred in admitting evidence of an extraneous offense during the guilt/innocence phase of trial in violation of Rule 404(b) and Rule 403 of the Texas Rules of Evidence. The evidence that was admitted established Leal was in the unlocked bathroom at a public park in November of 2007. When an undercover police officer went inside the bathroom, Leal asked the officer to "suck his penis."

During trial, the State proffered the evidence at a hearing outside the jury's presence. During the proffer, the State listed numerous grounds for which the evidence was admissible under

Rule 404(b). In his brief, Leal addresses these grounds asserting the evidence was not admissible to rebut a defensive theory or to prove: (1) motive; (2) opportunity; (3) identity or *modus operandi*; or (4) habit, routine, or practice. The State responds the evidence was admissible to rebut a defensive theory and to prove opportunity or possibility and *modus operandi*.

Rule 404(b) provides as follows:

> (b) Crimes, Wrongs, or Other Acts
>
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses; Notice in Criminal Case. The evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence — other than that arising in the same transaction — in its case-in-chief.

TEX. R. EVID. 404(b). The list of permitted uses or exceptions in Rule 404(b) is illustrative but is not exhaustive. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). "Rebuttal of a defensive theory is also one of the permissible purposes for which evidence may be admitted under Rule 404(b)." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

"Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court." *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011) (internal citations omitted). "Thus, a trial court's ruling on the admissibility of extraneous offenses is reviewed under an abuse-of-discretion standard." *Id*. A trial court does not abuse its discretion if its ruling is within the zone of reasonable disagreement. *Id*. A trial court's 404(b) ruling admitting evidence "is generally within this zone if the evidence shows that 1) an extraneous transaction is relevant to a material, non-propensity issue, and 2) the

probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury." *De La Paz*, 279 S.W.3d 344.

A. Relevance

In arguing for the admission of the extraneous offense evidence before the trial court, the State asserted the evidence was admissible because statements made by defense counsel during voir dire and his cross-examination of several witnesses raised the defensive theory of fabrication. Extraneous offense evidence is admissible to rebut a defensive theory that the complainant fabricated the allegations against the defendant. *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008).

In his brief, Leal contends he did not accuse R.C. of fabricating his testimony; therefore, he did not open the door to the use of the extraneous offense evidence to rebut such a defense. In voir dire and in cross-examining several witnesses, however, defense counsel repeatedly made reference to people being falsely accused of sexual crimes and to children making up allegations of sexual abuse. In addition, defense counsel repeatedly used the term "lying" when questioning R.C. and then elicited testimony that a child's credibility is damaged when the child "lies" about factual details. In questioning the physician who performed the sexual assault exam, defense counsel elicited testimony that the physician's diagnosis of sexual abuse was dependent on R.C.'s honesty. Therefore, the trial court did not abuse its discretion in concluding the defensive theory of fabrication was raised.[1]

[1] In its brief, the State argues the defensive theory of "frame up" also was raised because the questioning implied Leal was "the innocent victim of a 'frame-up' by the complainant or others." *Wheeler v. State*, 67 S.W.3d 879, 887 n. 22 (Tex. Crim. App. 2002). The State does not explain how a "frame up" defense is different than asserting the complainant fabricated the story, and the Texas Court of Criminal Appeals has stated the case law "makes no categorical distinctions between 'fabrication' defenses and 'frame-up' or 'retaliation' defenses." *Bass*, 270 S.W.3d at 563.

Leal next contends the facts of the extraneous offense are not sufficiently similar to the charged offense; therefore, the evidence should not have been admitted. In order for extraneous offense evidence to be admissible to rebut a defensive theory in a child sexual assault case, "the extraneous misconduct must be at least similar to the charged one." *Wheeler v. State*, 67 S.W.3d 879, 887 n. 22 (Tex. Crim. App. 2002). The degree of similarity necessary when the extraneous offense is used to rebut a fabrication defense, however, is not as exacting as when the evidence is being used to show a defendant's *modus operandi*. *Newton v. State*, 301 S.W.3d 315, 318 (Tex. App.—Waco 2009, pet. ref'd); *Dennis v. State*, 178 S.W.3d 172, 178-79 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd).

In this case, both the charged offense and the extraneous offense occurred in unlocked public restrooms. In addition, R.C. described the act as "suck[ing] on [each other's] middle part," and Leal asked the undercover officer to "suck his penis." Given the unique setting and similarity of the acts, the trial court did not abuse its discretion in concluding the extraneous offense was sufficiently similar to the charged offense. *See Newton*, 301 S.W.3d at 318 (noting only "some similarity" is required when extraneous offense rebuts fabrication defense); *Dennis*, 178 S.W.3d at 179 (holding similarity necessary when rebutting fabrication defense is not one of "exacting sameness").

Finally, Leal contends the extraneous offense evidence was not relevant to rebut a fabrication defense because the evidence did not make R.C.'s allegations more probable. We disagree. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." TEX. R. EVID. 401. In this case, the trial court could have found the evidence that Leal requested the same sexual act in another unlocked public restroom made it more probable that Leal had R.C. engage in oral sex in a public restroom and, therefore, less likely that R.C. fabricated the abuse.

Given how broad "relevant" evidence is defined, we cannot conclude the trial court abused its discretion in determining the evidence was relevant to rebut Leal's fabrication defense.

Because we hold the extraneous offense evidence was admissible to rebut Leal's fabrication defense, we do not address the other reasons proffered for the admissibility of the evidence under Rule 404(b). *See* TEX. R. APP. P. 47.1 (providing opinions need only address issues necessary to final disposition of the appeal).

B. Unfair Prejudice

Although we hold the extraneous offense evidence was relevant to rebut a defensive theory, we must next consider whether the probative value of the extraneous offense evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *De La Paz*, 279 S.W.3d at 343-44; TEX. R. EVID. 403.

We review a trial court's ruling under Rule 403 for an abuse of discretion. *Pawlak v. State*, 420 S.W.3d 807, 810 (Tex. Crim. App. 2013). Under this standard, the ruling of the trial court must be upheld if it is within the zone of reasonable disagreement. *Id*.

In conducting a Rule 403 analysis, we consider the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012). Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial. *Rayford v. State*, 125 S.W.3d 521, 529 (Tex. Crim. App. 2003). "Rule 403 requires exclusion of evidence only when there exists a clear disparity between the degree of prejudice of the offered evidence and its probative value." *Conner v. State*, 67 S.W.3d 192, 202 (Tex. Crim. App. 2001).

In this case, the extraneous offense evidence was probative to rebut Leal's defense of fabrication. The time needed to develop the evidence was minimal as the officer's testimony spans only three pages of the reporter's record. Furthermore, given Leal's efforts to discredit R.C. and his emphasis on the physician's diagnosis of abuse being dependent on R.C.'s honesty, the State's need for the evidence was high. Although the Texas Court of Criminal Appeals has held sexually related bad acts are inherently inflammatory, *Pawlak*, 420 S.W.3d at 809, we conclude the trial court did not abuse its discretion in weighing the four factors and concluding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

CONTINUED GUILT-INNOCENCE DELIBERATIONS DURING PUNISHMENT PHASE

In his final issue, Leal contends the trial court erred in instructing the jury to complete the verdict form for the second count after the trial court discovered during the punishment phase of trial that the jury failed to answer that count. Leal asserts the jury was tainted by the evidence admitted during the punishment phase when it found him guilty of the second count. The State responds the jury's intention to convict Leal of both counts is ascertainable from the record, including the notes the jury sent the trial court. In addition, the State contends we must presume the jury followed the trial court's instructions.

A. Jury Deliberations and Verdict

The jury charge given to the jury at the conclusion of the testimony during the guilt/innocence phase of the trial contained two verdict forms — one for each count. The first verdict form is labeled "COUNT I" at the top and contains two separate paragraphs presenting two options. The foreperson would sign the first option if the jury found Leal not guilty and the second option if the jury found Leal guilty. Similarly, the second verdict form is labeled "COUNT II" and also contains two separate paragraphs presenting the two options.

After the jury returned its verdict on guilt/innocence, trial was recessed for the day. The following day, the punishment phase of trial proceeded. The State formally re-offered all of the evidence and testimony from the guilt/innocence phase of trial and also offered into evidence one exhibit which was Leal's two prior judgments. Leal did not present any evidence during the punishment phase of trial.

Before the jury was retired for punishment phase deliberations, the trial court read the punishment phase jury charge to the jury. The first sentence in that charge stated, "By your verdicts returned in this case, you have found the defendant, Jose Carlos Leal, guilty of the offense of aggravated sexual assault of a child in Counts I and II."

The jury sent four notes to the trial court during its punishment phase deliberations. In the first note, the jury asked, "Are we coming up with a sentence [for] each stated count or a total sentence for the guilty verdict [in] general?" In the second note, the jury stated, "Last 2 pages have inconsistent Jose Carlos Leal v. Jose Carlos Lopez." The trial court responded, "In response to your first question, the Court's Charge provides a verdict form for each of the counts. In response to your statement, the last two pages with inconsistent names of the defendant is a typographical error. It has been corrected manually. Please proceed with your deliberations."

In the third note, the jury asked, "Are the sentences concurrent or consecutive?" The trial court responded, "In response to your second question, generally, sentences run concurrently. The Judge, however, has discretion to order that the sentences be served consecutively."

In the fourth note, the jury asked, "Can you define Count 1 and Count 2 which was the defendant on the child and which the reverse?" In reviewing the jury charge to prepare a response to this question, the trial court discovered the verdict form for the second count had not been signed. Over Leal's objection, the trial court responded, "As preparations were being made to answer your question, 'Can you define Count 1 and Count 2 which was the defendant on the child

and which the reverse?' it was noted that the Court's Charge (First Phase) Count II was not signed. The Court's Charge is returned to you. The jury returned a verdict as to Count I. Did the jury intend to return a verdict as to Count II? If yes, please indicate your verdict. If no, please inform the Court." After a short deliberation, the jury foreperson signed the verdict form indicating the jury found Leal guilty of the second count.

B. Discussion

Leal argues the trial court erred in instructing the jury to continue guilt/innocence deliberations after the punishment phase of the trial had begun. Although not directly on point, the Texas Court of Criminal Appeals decision in *Reese v. State*, 773 S.W.2d 314 (Tex. Crim. App. 1989), is informative. In *Reese*, the appellant was convicted in a single trial of sexual assault of a child and compelling prostitution. 773 S.W.2d at 315. During the trial, two different verdict forms were submitted to the jury, which the court described as follows:

> One form contained blanks for answering "guilty" or "not guilty" for the offense of compelling prostitution. The lesser included offense of prostitution was submitted on the same form with blanks for "guilty" and "not guilty." A separate form for the sexual assault offense was also submitted.

Id. at 316.

When the jury returned to the courtroom after deliberations, the jury announced they had reached a verdict. *Id*. At that time, the trial court noticed that only the verdict form for the sexual assault offense had been signed; the other verdict form did not contain a signature for any option. *Id*. The trial court informed the jury it forgot to sign a verdict as to the second offense and returned the jury for deliberation. *Id*.

On appeal, the appellant asserted the trial court erred in not following articles 37.04 and 37.05 of the Texas Code of Criminal Procedure ("Code") regarding the method to be used in receiving the verdict and in polling the jury. *Id*. The intermediate appellate court agreed,

concluding the trial court erred by not utilizing the procedures set out in articles 37.04 and 37.05. *Id*. at 316-17. The State then appealed to the Texas Court of Criminal Appeals. *Id*. at 317.

The court first held the appellant waived any complaint regarding the polling of the jury because a poll was not requested. *Id*. With regard to returning the jury for further deliberations, the court noted "[a]n incomplete or unresponsive verdict should not be received by the court." *Id.* "It is not only within the power, but it is the duty of the trial judge, to reject an informal or insufficient verdict, call to the attention of the jury the informality or insufficiency, and have the same corrected with their consent, or send them out again to consider their verdict." *Id*. The court asserted the jury was obviously "confused by the forms and the numerous blanks." *Id*. When the jury returned from deliberations without an answer to the compelling prostitution offense, the court concluded, "the trial court not only had the power to send the jury back for further deliberations but it was his duty to do so." *Id*. at 318.

In his brief, Leal correctly notes the trial court in *Reese* discovered the blank verdict form before the punishment phase of the trial began. In the instant case, however, the trial court did not discover the blank until after the punishment phase of the trial had begun; therefore, Leal argues the trial court erred in instructing the jury to continue guilt/innocence deliberations. In support of his argument, Leal relies on article 37.07, § 2 of the Code which requires the trial judge to declare a mistrial if the jury fails to agree on the issue of guilt or innocence and only allows the trial court to proceed with the punishment phase of trial if the jury returns a finding of guilt. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2 (West Supp. 2015). The record in the instant case, however, does not explicitly reflect that the jury failed to agree on the issue of guilt or innocence with regard to Count II. Instead, the record establishes that the verdict form as to Count II was blank thereby indicating the jury failed to answer either guilty or not guilty. Because the record does not explicitly reflect that the jury failed to agree, the real issue presented in this case is whether the

trial court erred in returning the jury for deliberations as to Leal's guilt/innocence with regard to Count II during the punishment phase of trial.

In *Rodgers v. State*, the jury was instructed on the offense of continuous sexual abuse and the lesser included offenses of aggravated sexual assault and indecency with a child. 442 S.W.3d 547, 548 (Tex. App.—Dallas 2014, pet. ref'd). The jury was provided two pages of verdict forms described as follows:

> The top of the first page had a space for the presiding juror to sign a verdict of guilty of continuous sexual abuse of a young child. Below that, there were spaces where the presiding juror had the option to sign a guilty verdict for aggravated sexual assault of a child, or a guilty verdict of indecency with a child by contact between the hand of the defendant and any part of the genitals of the complainant with the intent to arouse or gratify the sexual desire of the defendant. Alternatively, at the top of the second page of the verdict forms, the presiding juror could sign a verdict of guilty of indecency with a child by contact between the hand of the complainant and any part of the genitals of the defendant with the intent to arouse or gratify the sexual desire of the defendant. Below that, the presiding juror could sign a verdict of not guilty.

Id. at 548-49. "The jury returned a guilty verdict with the presiding juror's signature beneath the lesser included offense of indecency with a child that appeared on the top of the second page of the verdict forms." *Id*. at 549. The trial court received the verdict and announced the verdict in open court. *Id*.

After a short break, the trial court proceeded with the punishment phase of trial. *Id*. "[T]he evidence on punishment consist[ed] of brief testimony from two witnesses." *Id*. After the jury heard this evidence, "a hearing was held outside the presence of the jury about the punishment charge." *Id*. During the hearing, the bailiff asked to speak to the judge, and the trial court subsequently announced that the jury foreman indicated he meant to sign the verdict form for the continuous sexual abuse of a child offense. *Id*. When the trial court announced its intentions to poll the jury, defense counsel objected because the trial court already had accepted the verdict, and the punishment phase of trial had begun. *Id*. at 549-50. The trial court overruled the objection.

Id. at 550. The jury was then returned to the courtroom, and the trial court asked the foreman whether the incorrect verdict form was signed. *Id*. After the jury foreman confirmed the wrong form was signed, the trial court had the defendant stand and announced the jury found him guilty of continuous sexual abuse. *Id*.

On appeal, the appellant argued the trial court had no authority to allow the jury to correct or change its verdict after it heard evidence on punishment because it violated the Code and "usurped the bifurcated trial process." *Id*. Appellant further argued any problem with the verdict had to be resolved before the trial court accepted the verdict, and "the jury could not revisit their guilty verdict after the punishment phase began." *Id*.

Citing *Reese* among other cases, the Dallas court noted, "Courts have consistently decided that trial courts do not err when the court returns the jury to further deliberate or correct the verdict form after the jury informs the court there was a written mistake in filling out the verdict form." *Id*. at 551. The court further asserted it was unpersuaded by appellant's attempt to distinguish those cases. *Id*.

Similar to Leal's argument in the instant case, the appellant in *Rodgers* relied on article 37.07, § 2 of the Code which only permits the punishment hearing to begin after a guilty verdict has been returned. *Id*. The Dallas court rejected the argument noting appellant failed to cite any authority precluding the trial court's action. *Id*. at 551-52. The Dallas court also noted the trial court's decision was consistent with "opinions permitting jurors who have been dismissed, but have not separated and are still in the court's presence, to correct their verdict after the trial court becomes aware of a problem with the verdict." *Id*. at 551 (citing *Webber v. State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983); *West v. State*, 170 Tex. Crim. 317, 340 S.W.2d 813, 814-15 (1960)). Finally, the Dallas court concluded, "Appellant has cited no authority that prohibits the trial court from allowing the jury to correct its mistake to reflect the jury's true decision on guilt/innocence

when the mistake is first discovered during the punishment phase of trial." *Id*. The Dallas court held the trial court did not err in permitting the jury to correct its verdict. *Id*. at 552.

Leal attempts to distinguish *Rodgers* by asserting the jury discovered its own error in that case. We disagree that the manner in which the jury's mistake is discovered is relevant to the analysis. Instead, a jury's verdict should be upheld if the jury's finding or intention can reasonably be ascertained. *Perez v. State*, 21 S.W.3d 628, 631 (Tex. App.—Houston [14th Dist.] 2000, no pet); *Tapley v. State*, 673 S.W.2d 284, 290 (Tex. App.—San Antonio 1984, pet. ref'd).

Unlike the jurors in *Rodgers* who reacted with "shock and disbelief" when the State questioned witnesses about the range of punishment during the punishment phase of trial, 442 S.W.3d at 550, the record in the instant case does not reflect the jury had any reaction when the trial court read the first sentence from the punishment phase jury charge stating the jury had found Leal guilty of both Counts I and II. In addition, the jury's first note acknowledged Leal was being sentenced for both offenses. Finally, after the trial court discovered the verdict on Count II was blank, it instructed the jury to indicate its verdict if it intended to return a verdict, and, if not, to inform the court.[2] The jury returned a verdict of guilty. We presume the jury followed these instructions and only returned a guilty verdict to Count II because that was the jury's intent. *See Casanova v. State*, 383 S.W.3d 530, 543 (Tex. Crim. App. 2012) (noting "usual presumption [is] that jurors follow the trial court's explicit instructions to the letter"). Based on the foregoing, we

[2] In objecting to this instruction, defense counsel asserted, "We've also been informed that before this note goes back, the jury has now said they've had a verdict for an hour and a half. And so they have had a verdict for Count I and Count II when the original verdict form had no finding of guilt in Count II." In response, the trial court clarified the jury told the bailiff a verdict had been reached; however, the jury did not convey that information to the court. Regardless, the jury's willingness to assess a sentence against Leal for Count II is another indication that the jury intended to find Leal guilty of that count. Otherwise, like the jurors in *Rodgers*, they would have expressed "shock and disbelief" that they were assessing a sentence against Leal for an offense on which they did not find him guilty.

hold the jury's intention to find Leal guilty of both offenses is reasonably ascertainable from the record, and the trial court did not err in allowing the jury to complete its verdict.[3]

With regard to Leal's assertion that the jury was tainted by the evidence presented during the punishment phase of trial, after re-offering the evidence and testimony from the guilt/innocence phase of trial, the State "offer[ed] State's Exhibit Number 4 into evidence, which is defendant's two prior judgments." No additional evidence was presented.[4] One judgment pertained to the indecent exposure offense referenced during guilt/innocence. The other judgment pertained to a second indecent exposure offense in 1999. Given the trial court's instruction to return a verdict as to Count II only if it was the jury's intent, we disagree that the judgments tainted the jury's verdict. *See Casanova*, 383 S.W.3d at 543.

CONCLUSION

The trial court's judgment is affirmed.

Sandee Bryan Marion, Chief Justice

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[3] We note the trial court in *Rodgers* went further than the trial court in the instant case because the trial court in *Rodgers* allowed the jury to change its verdict while the trial court in the instant case only allowed the jury to complete its verdict.

[4] In closing argument, defense counsel explained the prior judgments as follows:

> …. The judgments introduced into evidence, just to get those out of the way, you already heard it once. There are two times in his life, one is when he was 24 years old and once when he was 30 — 33, he did get arrested for trying to have a sexual encounter with what he thought was a consenting adult and turned out to be an undercover cop at the park. And he plead guilty to those. He didn't fight those. He said, yes, I did that. It was [an] undercover cop and so he did probation on those and that's the extent of his criminal history.